FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 808

THE NEW YORK CENTRAL RAILROAD COMPANY,
a Michigan corporation, for itself, and as Lessee, Assignee
and Subrogee of The Michigan Central Railroad Company,
a Michigan corporation,
Petitioner,
vs.
THE CITY OF DETROIT, a Municipal corporation,
existing under and by virtue of the laws of
the State of Michigan,
Respondent

THE NEW YORK CENTRAL RAILROAD COMPANY,
a Michigan corporation, for itself, and as Leseee, Assignee
and Subrogee of The Michigan Central Railroad Company,
a Michigan corporation, and
THE MICHIGAN CENTRAL RAILROAD COMPANY,
a Michigan corporation,
Petitioner,
vs.
THE CITY OF DETROIT, a Municipal corporation,
existing under and by virtue of the laws of
the State of Michigan,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioner, The New York Central Railroad Company, prays that a writ of certiorari be issued to review the judgment of the Michigan Supreme Court entered in the above-entitled case on December 3, 1958. Rehearing denied on January 12, 1959.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court for Wayne County is unreported and is printed in the record submitted to the Court below at pages 207a-209a. It is also printed in Appendix C annexed to the instant petition at page 7a.[1]

The opinion and judgment of the Michigan Supreme Court is printed in Appendix D, *infra*, pages 10a-47a, and is reported at 354 Mich. 637, and 93 N. W. 2d 481. The order denying petitioner's motion for rehearing is unreported and is printed in Appendix E, *infra* page 48a.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on December 3, 1958. Appendix D, *infra*, page 46a. Rehearing was denied on January 12, 1959. Appendix E, *infra*, page 48a. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

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[1] The record submitted by petitioner to the Michigan Supreme Court was printed in the form of an appendix. Petitioner will indicate references to that appendix as "R. —a." References to the appendices to the instant petition will be indicated as "Appendix —, *infra*, p. —."

QUESTIONS PRESENTED

1. Were tax assessments levied on a "front foot" basis against an abutting parallel railroad right-of-way, and amounting to more than one-half of the total amount assessed for paving a truck highway running through an industrial and truck terminal area to an expressway, patently arbitrary and unreasonable in violation of the due process clause of the 14th Amendment of the Constitution of the United States?

2. Was a railroad's right to the equal protection of the laws, guaranteed by the 14th Amendment of the Federal Constitution, denied by assessments made by a City against its right-of-way amounting to more than one-half of the amounts specially assessed against all property owners, when such assessments were levied to improve a truck highway and when truck terminals and other property in the vicinity, which the City had found to have benefited from the opening of the highway, were omitted from the assessment district?

3. Was petitioner railroad denied the equal protection of the laws in assessments levied by a City against its railroad property on a "front foot" basis, without regard to the past, present or foreseeable future use of such property, when the City took present use of residential property into account in reducing the "front foot" assessments against such property by sixty-five percent of the amount assessed against petitioner's property?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory provisions involved are: U. S. C. Const. Amend. 14; Detroit City Charter, Chapter III, Title VI, Sections 1 and 2. They are printed in Appendix A, *infra*, pages 1a-3a.

STATEMENT OF THE CASE

The City of Detroit levied special tax assessments against petitioner's railroad right-of-way to build a heavy-duty concrete highway, connecting with a limited-access expressway, to carry trucks to and from an area in which many of petitioner's motor carrier competitors had established terminals (R. 26a, 27a, 30a, 31a, Ex. 33, Ex. 41).

The amount of the assessments against the railroad for the paving was greater than the total of the assessments against all the other property owners in the district (R. 204a, 206a).

Petitioner's main line enters Detroit from the west through Dearborn, an adjoining city. This line runs parallel to and about six blocks south of Michigan Avenue, an important east-west thoroughfare. The Edsel Ford Expressway runs through Dearborn in a northeasterly direction and crosses the railroad and Michigan Avenue on the east side of that city (Ex. 3; R. 180a).

Lonyo Road runs north and south about one-half mile east of the Detroit-Dearborn city limits. About seventeen hundred feet further east, paralleling Lonyo Road, is Central Avenue. A mile east of Central is Livernois Avenue, the principal north-south thoroughfare of the west side of Detroit (Ex. 3; R. 180a).

The area between petitioner's tracks and Michigan Avenue, from Livernois west to the Detroit-Dearborn line, is divided into an industrial and a residential zone. The industrial zone extends about three blocks north of the tracks and contains a few small industries and a large number of trucking terminals. The area north of this zone is residential (Ex. 3; R. 180a).

The railroad property south of the industrial zone was developed many years ago for main line transportation, industrial tracks and freight classification yards. There is no depot or freight station in this vicinity (R. 77a, 80a, 82a).

Prior to 1951, Southern Avenue (now John Kronk Highway), a gravel-surfaced road parallel and adjacent to petitioner's main line right-of-way, ran east and west between Miller Road in Dearborn and Lonyo Road in Detroit, a distance of approximately one and one-half miles (R. 18a, 26a, 76a, 81a, Ex. 3).

In 1951, home owners in the area north of the railroad petitioned the City of Detroit for a road to relieve their streets of heavy truck traffic (R. 26a). After a study, the City determined that there had been a substantial increase in truck traffic due to the development of many new trucking terminals in the area (R. 27a). It was found that a truck outlet from this area to the expressway could be established by extending and improving Southern Avenue (R. 26a, 27a, Ex. 3, 180a).

At first the City planned to extend Southern Avenue eastward from Lonyo Road to Livernois Avenue, over a route some distance north of the railroad, but, because of objections from home owners, it was decided that a route should be condemned along the north edge of the railroad right-of-way. The first segment condemned extended from

Lonyo Road eastward to Central Avenue (R. 27a, 31a). Under the City Charter, Chapter III, Title VI, §1, Appendix A, *infra*, page 1a, a special assessment district was created to bear part of the cost of opening this part of the highway (R. 190a-192a). All the land within three or four blocks north of the railroad between Lonyo Road and Central Avenue, and much of the industrial and truck terminal property west of Lonyo Road and east of Central Avenue, was included in the "opening" district. The City did not find that any railroad property benefited from the "opening" (Ex. 33; R. 188a, 189a).

Southern Avenue was force paved between the city limits and Lonyo Road in 1951 (R. 30a), and from Lonyo Road to Central Avenue in 1954 (Ex. 28; R. 183a). To take heavy truck traffic, the pavement was constructed one-half wider and one-third thicker than usual (R. 31a). The City Council directed (R. 182a-185a) that the paving assessments be levied against the abutting property—including the railroad line which had not been found to have benefited from the "opening" of the same highway. The City Charter provided that, in either opening or paving a highway, property receiving special benefits be assessed "in proportion to the probable benefit to be derived therefrom." Appendix A, *infra*, page 1a.

The railroad abutted the highway over its entire length, and petitioner was assessed more than one-half of the cost of the project when the first segment was paved (R. 204a). After the railroad protested, the City assumed part of the cost and assessed the balance, $36,389, against the abutting owners (R. 31a, 204a). Petitioner's portion of this assessment was $19,606.20 (R. 204a).

The district for the paving of the second segment was assessed $30,034, the railroad's portion being $15,384.28 (R. 206a).

Paying the assessments under protest, the railroad brought two suits to recover, alleging in its pleadings: (1) The City was developing a heavy-duty "bridge" highway for its trucking competitors that had terminals in the area, and to relieve residential streets of truck traffic; (2) the highway was not a local improvement that benefited the railroad; (3) the City violated its Charter in levying the assessment, and (4) the assessments were unreasonable, arbitrary, capricious and discriminatory and violated the 14th Amendment of the Constitution of the United States. Appendix B, *infra*, pages 3a-6a. The cases were consolidated for trial and appeal.

For more than 100 years petitioner's assessed property has been used exclusively for railroad purposes, and no abandonment of the railroad is contemplated (R. 82a, 104a, 125a). With the exception of two terminals abutting the highway, no trucking company was assessed, although the City had found that many received special benefits from the opening of this highway (Ex. 33). After petitioner protested, the City attempted to induce Wayne County to underwrite the project because the highway was being developed as an auxiliary to the County expressway system (Ex. 34; R. 189a). Petitioner's assessment was not confirmed until after the County refused to assume the cost (Ex. 34; R. 189a).

The development of the new highway increased the time and cost of performing switching, and created a safety hazard for the railroad (R. 126a, 127a, 128a).

There are no roads or driveways from railroad property into John Kronk Highway (R. 124a, 125a, 166a). Because of the classification yards and other tracks it is impracticable to open driveways into John Kronk Highway (129a-131a).

The City Assessors relied upon their custom and practice of assessing abutting property owners on a "front foot" basis for street paving (R. 157a).

The fact that petitioner's property now, and for the reasonably foreseeable future, is dedicated to railroad use was not considered in determining "probable benefits," but part of the industrially-zoned property on the other side of the street was assessed only thirty-five percent of the front footage because it was then used for residential purposes (R. 150a-153a).

The only testimony offered to show that the railroad benefited from this truck highway was an appraiser's opinion that the whole community benefits from new highway construction (R. 167a). No evidence was offered to show any special benefit to railroad property justifying the assessment against it of over one-half of the amounts locally assessed; nor to show that the truck terminals and other property owners, who had been found to benefit from the "opening" of the highway, received no special benefits from the paving of the same highway.

The City did not offer any evidence other than "customary procedure" to explain how railroad land—that had not been found to receive any special benefits from the "opening" of the highway—could have received more than one-half of the special benefits from the paving of the same street.

The Trial Court denied the relief sought, impliedly holding that the assessments did not violate petitioner's constitutional rights to due process and to the equal protection of the laws. Appendix C, *infra*, page 7a.

Petitioner appealed to the Michigan Supreme Court, raising the constitutional issues in the manner provided by Michigan appellate procedure in its statement of ques-

tions involved. The second question put to the Court was whether the United States Constitution was violated because the assessments were arbitrary, unreasonable and discriminatory and constituted a fraud on petitioner. Appendix B, *infra*, page 6a. On appeal, the Michigan Supreme Court was divided four to four, thus permitting the judgment of the Trial Court to stand. Appendix D, *infra*, page 10a. Justice Black, writing for reversal, said:

> "• • • plaintiff has proved beyond assail: (1) that neither the railroad nor its specially assessed property will, in effect, receive practical, distinguished from fanciful, benefits from the two segments of street improvement • • •." Appendix D, *infra*, page 30a.
>
> "• • • we hold that the assessments in question arbitrarily discriminate against the plaintiff railroad in violation of rights secured to it by the 14th Amendment." Appendix D, *infra*, page 36a.

Justices Smith and Voelker concurred in this opinion. Appendix D, *infra*, page 46a.

Justice Kelly wrote a separate opinion in which he agreed with Justice Black's conclusions, but also held petitioner's rights under the Charter of the City of Detroit and the Constitution of the State of Michigan were violated. Appendix D, *infra*, page 23a.

Justice Kavanaugh held that petitioner's constitutional rights were not violated:

> "Plaintiffs in this case have not sustained the burden of showing that the special assessments were not levied in proportion to the benefits derived and that the Common Council abused its discretion. The Common Council is presumed to have acted in good faith and to have exercised correctly the discretion imposed in them. • • •" Appendix D, *infra* page 22a.

This opinion was concurred in by Chief Justice Dethmers and Justices Carr and Edwards. Appendix D, *infra*, page 23a.

The railroad's application for a rehearing was denied on January 12, 1959. Appendix E, *infra*, page 48a.

REASONS FOR GRANTING THE WRIT

Special assessments that are palpably arbitrary or discriminatory may be attacked under the 14th Amendment. This rule, while well established, cannot be applied with such exactitude that assessments violating constitutional rights can be separated from proper assessments by any precise tests. It is necessary to review the facts in each case before it can be determined whether the taxpayer has been denied "due process" or "equal protection."

The assessments against petitioner on a "front foot" basis for paving a truck highway that abuts its railroad for one and one-half miles, was upheld by the Trial Court without evidence that petitioner received a special benefit from the project. The highway was actually a detriment not a benefit to the railroad.

The Trial Court's decision conflicts with *City of Commerce v. Southern Railroad Company*, (C. A. 5) 35 F. 2d 331 (1929) and *Carolina and Northwestern Railroad Company v. Town of Clover, South Carolina, et al.*, (C. A. 4) 46 F. 2d 395 (1931). In these cases it was held that a special assessment is not saved by adherence to the "front foot" rule if the assessment is in effect confiscatory or out of all proportion to benefits received.

As Justice Black of the Michigan Supreme Court stated, these assessments were, in effect, confiscatory and out of all proportion to the benefits the railroad received.

This case presents a question of vital importance to an industry that is struggling for survival. Unsubsidized railroads compete with motor and other carriers that regularly receive direct or indirect aid or benefits from national, state and local expenditures. Here, the Trial Court upheld an assessment against a railroad based wholly on front footage for a heavy-duty truck-highway pavement linking a truck terminal area with an expressway. The future of the railroads, vital as they are to our economy and national defense, is certainly in jeopardy if they can be required to pay for special highways for their principal competitors on the theory that they benefit therefrom in proportion to front footage of their private rights-of-way abutting such highways. Land contiguous to railroad lines, because of the proximity of industry and the usual absence of valuable residential property, may be desirable for truck routes, but the adjoining railroad rights-of-way cannot be taxed for the construction costs without destroying the railroads' ability to provide an adequate public transportation service.

As noted by Justice Black:

> "Will not each of the other cities and villages, on and on toward the setting sun, be enabled at will to 'beneficially' assess plaintiff's right of way to meet half or more the cost of paving present and future trackside streets or highways? At this specially levied cost rate of at least $50,000 per rail mile, even the greatest railroad of the United States might, in event of such affirmance, be forced out of the rail carrier business in Michigan." Appendix D, *infra*, page 45a.

The railroads have been faced with ever-increasing costs for highway protection and grade separations made necessary by the rapid development of America's highways. The growth of the motor carrier industry, keeping pace with highway development, makes the burden even more onerous. This nation has embarked upon a prodigious program of highway construction and modernization, which will necessitate the building of access or supplementary roads to the many expressways and freeways programmed throughout the country. The advantages of establishing special routes from truck terminal and industrial areas, frequently lying adjacent to railroads, will be apparent to all city planners. If the railroads have no constitutional protection against automatic "front foot" assessments to finance such roads, it is unlikely that local assessors will give any, much less to say proper, consideration to the matter of benefits or the exigencies of national transportation.

Aside from the economic factors involved, this case presents a serious question regarding petitioner's right to be free from unreasonable and arbitrary action on the part of the local governmental officials. The Trial Court, citing *Louisville & Nashville RR. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. Ed. 819, 25 S. Ct. 466 (1905) held, that the assessors were not required to consider the fact that the railroad would not benefit. The railroad's land was, therefore, assessed the same as if it were being used for truck terminals or for factories utilizing trucking services. However, across the street from the railroad the City did take present usage into account in assessing industrially-zoned residential property at only thirty-five percent of front footage. In addition, almost all the truck terminals and other industrial properties that the City had previously found to benefit from the opening

of this highway, were omitted from the district assessed for this paving project. The discrimination against, and the arbitrary treatment of, the railroad was patent and should have been corrected. As Mr. Justice McReynolds said in *Kansas City Southern Railway Co. v. Road Improvement District #6 of Little River County, Arkansas*, 256 U. S. 658 at 661, 65 L. Ed. 1151, 41 S. Ct. 604 (1921):

> "Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contributions demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

In this case the railroad was treated on a wholly different basis than other taxpayers, particularly the trucking companies that received the real and direct benefits.

The right of a city to levy special assessments against a railroad for a street improvement was never questioned by the petitioner. It is the abuse of that power that is in issue here. In *Village of Norwood v. Baker*, 172 U. S. 269 at 278, 43 L. Ed. 443, 19 S. Ct. 187 (1898), the Court stated:

> "The power of the Legislature in these matters is not unlimited [citing cases] • • • the guarantees of the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the Legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned in the Courts of the country. It is one thing for the Legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such

> improvement, and therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received."

The evidence clearly established that petitioner received no special benefit from the heavy-duty paving. The City admitted that the highway was constructed to accommodate truck traffic. No special circumstances existed to indicate that the railroad might benefit from this project to a greater extent than any other property owner in the city, but the Trial Court nevertheless upheld the assessments against petitioner of more than one-half of the total amount assessed. The holdings in earlier cases, that a railroad benefits from street construction, need not be questioned here in order to raise the constitutional issues involved in these assessments.

The action by the City in this case conflicts in principle with the many decisions of this Court which hold that assessed benefits must have some real basis other than mere speculation or conjecture. *Kansas City Southern RR. v. Road Improvement District #3 of Sevier County, Arkansas*, 266 U. S. 379, 69 L. Ed. 335, 45 S. Ct. 136 (1924); *Thomas v. Kansas City Southern Ry.*, 261 U. S. 481, 47 L. Ed. 758, 43 S. Ct. 440 (1922). An assumption without reason, that a century old railroad main line from Detroit to Chicago will be abandoned and that therefore it receives greater benefits from a truck pavement than all the other property in a truck terminal and industrial area, is er-

tainly mere speculation and conjecture. The City should have taken into consideration the measurable permanency of the use and made its assessment accordingly. *City of San Diego v. Atchison, Topeka and Santa Fe,* (C. A. 9) 45 F. 2d 11, cert. denied 283 U. S. 830, 75 L. Ed. 1443, 51 S. Ct. 364 (1930).

This Court has consistently held that a special assessment which is out of all proportion to the benefit received, cannot stand against the complaint of one so taxed. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55, 60 L. Ed. 523, 36 S. Ct. 254 (1915); *Village of Norwood v. Baker, supra; Martin v. District of Columbia,* 205 U. S. 135, 51 L. Ed. 743, 27 S. Ct. 440 (1907); *Road Improvement District #1 of Franklin County, Arkansas v. Missouri Pacific RR. Co.*, 274 U. S. 188, 71 L. Ed. 992, 47 S. Ct. 563 (1927). Other courts have also held that a special assessment without a benefit is confiscatory and in violation of the "due process" and "equal protection" clauses of the 14th Amendment. *City of Commerce v. Southern Railroad Co.* (C. A. 5), 35 F. 2d 331 (1929); *Carolina and Northwestern RR. Co. v. Town of Clover, South Carolina, et al.* (C. A. 4) 46 F. 2d 395 (1931).

The decision in *Louisville & Nashville RR. Co. v. Barber Asphalt Co., supra,* cited in one opinion filed in the Court below, is not authority for the facts of this case. The holding that land may be considered in its general relations and apart from its particular use, must be considered in relation to the facts of that case. In a later decision, Justice Holmes qualified the language he used in the opinion of the *Barber Asphalt* case:

> "Constitutional rights, like others, are matters of degree." and

> "• • • when the chance of cost exceeding benefits grows large and the amount of the not improbable excess is great, it may not follow that the case last cited [*L. & N. v. Barber*] will be a precedent." *Martin v. District of Columbia*, 205 U. S. 135 at 139, 27 S. Ct. 440, 51 L. Ed. 743 (1907).

This Court, speaking through Justice Brandeis, took notice of the effect of highway competition on the railroad industry in *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405 at 426, 55 S. Ct. 486, 79 L. Ed. 949 (1934):

> "The new highway, paralleling lines of the railway and intended for rapid moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the railway's revenue and net earnings."

The fact that the assessments against petitioner so far exceeded any small benefit it received from the project, must be patent and obvious. The size of the assessment against the railroad, the unequal treatment it received before the assessing authority, the nature of the highway project and the resulting subsidization of petitioner's competitors, should have compelled adherence by the Michigan Courts to the many decisions of this Court upsetting arbitrary, unreasonable and discriminatory assessments.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional Provision:

U. S. C. Const. Amend. 14—

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions:

Detroit City Charter—Chapter III—Title VI—

Section 1. Whenever the Common Council shall ascertain the cost and expense of opening, widening, vacating, altering, straightening, extending or abolishing of any highway, street, alley, avenue or other thoroughfare, or the construction of a lateral sewer or drain, or the acquisition and improvement of parks, playgrounds or other recreational facilities, or the acquisition of land for and the construction of community centers, or the acquisition of land for and the construction of facilities for the parking of vehicles or the acquisition of land for and the construction of seawalls, breakwaters and dikes, or any other local improvement, it shall thereupon cause such portion thereof as it may deem just to be equitably assessed against the lots or parcels of real estate to be benefited thereby in proportion to the probable bene-

fits to be derived therefrom. (As amended August 5, 1952. In effect August 15, 1952.)

Section 2. Whenever the Common Council shall order the grading and paving of any highway, street, alley, avenue or other thoroughfare, except boulevards, or the building of any sidewalks or any other local improvement, it shall thereafter ascertain the cost and expense of the same and thereupon cause such portion of such cost and expense (except the cost and expense of grading and paving the intersection of cross streets and alleys and the cost and expense of building crosswalks and intersections of sidewalks) as it may deem just to be equitably assessed against the lots or parcels to be benefited by such local improvement in proportion to the probable benefit to be derived therefrom. That portion of the cost of grading and paving any highway not so equitably assessed as herein provided, shall be paid from the general road fund as provided in section 3 hereof: Provided, That whenever the common council shall order the building of any sidewalks, it shall first give the owners or occupants of, or parties in interest in the abutting real estate opportunity to build at their own expense the sidewalks ordered in accordance with specifications fixed by the council: Provided, further That in cases of grading and paving, where a side street opens on but does not extend across the street to be graded and paved, the space formed by extending the lines of the former street to the middle of the latter street shall, for the purposes of this section, be treated as the spaces formed by the intersections of cross streets: Provided, further, That all necessary platforms and curbings shall, for the purposes of this section be deemed to be included within the term "paving". (As amended April 4, 1949. In effect, April 15, 1949.)

APPENDIX B

DECLARATION

(Filed June 15, 1953)

(Cause No. 272,987)

Now comes the plaintiff, by its attorneys, Grey K. Nelson and Harold C. Saakvitne, and says:

Count 1

* * * 7. That this plaintiff is informed and believes, and herewith charges, that the defendant, through its Common Council, acting upon the recommendation of the City Plan Commission, copies of reports and actions of Common Council being Exhibits "A," "B," "C," and "D," attached hereto and incorporated herein by reference, has begun and will continue to develop said Southern Avenue in conjunction with other governmental authorities as part of a heavy-duty trucking "bridge highway" from Livernois Avenue to the area of the expressway running west from the City of Detroit, and that Southern Avenue will be converted from a secondary street into a "bridge highway" for the benefit of this plaintiff's trucking competitors and particularly the several truck companies operating terminals in the vicinity of said highway, and motorists and property owners of a substantial part of the West Side of Detroit, whose other streets and highways will thus be relieved of the traffic congestion, hazards, vibration, street damage and noxious fumes and odors

ordinarily resulting from concentrations of heavy cargo-carrying motor vehicles.

8. That it is the plan and intention of the defendant, according to the information and belief of this plaintiff based upon the exhibits attached hereto, to develop this new bridge highway generally along the route of Southern Avenue not as a local improvement but as an improvement for the benefit of the West Side property owners, for the benefit of the motorists using West Side thoroughfares, and for the particular benefit of plaintiff's trucking competitors and their customers, and for the general benefit of the city as a whole.

• • • 12. That a detriment rather than a benefit inures to the plaintiff and its lessor in that the whole highway when completed is intended by the defendant and will become a competing right-of-way to the plaintiff's line of railroad and to the property of its lessor to be paid for by public funds and special assessments levied against the abutting property owners, including this plaintiff and/or its lessor; that this said assessment is invalid, unlawful, and void for the following reasons:

A. That it violates amended Sections 1, 2, 3, and 4 of Chapter 3, Title 6 of the Charter of the City of Detroit in that it is not based upon benefits inuring to the plaintiff and/or its lessor and that it does not in any way benefit said property but is a benefit to this plaintiff's competitors and to the city at large;

• • •

C. That said assessment is invalid, unlawful, and void for the reason that it violates the 14th amendment to the Constitution of the United States.

DECLARATION

(Filed February 3, 1956)

(Cause No. 284,352)

Now come the plaintiffs, by their attorneys, G. H. Wyatt, J. I. Alspector and M. L. Cullen, and say:

• • • 9. That plaintiffs are informed and believe, and herewith charge, that the defendant, through its Common Council, acting upon the recommendation of the City Plan Commission, has begun and will continue to develop said John Kronk Highway as part of a heavy-duty trucking "bridge highway" from Livernois Avenue to the area of the expressway running west from the City of Detroit, and that John Kronk Highway will be converted from a secondary street into a "bridge highway" for the benefit of plaintiffs' trucking competitors and particularly the several truck companies operating terminals in the vicinity of said highway, and motorists and property owners of a substantial part of the West Side of Detroit, whose other streets, and highways will thus be relieved of the traffic congestion, hazards, vibration, street damage and noxious fumes and odors ordinarily resulting from concentrations of heavy cargo-carrying motor vehicles.

10. That it is the plan and intention of the defendant, according to the information and belief of plaintiffs based upon the reports of the Common Council, to develop John Kronk Highway as a "bridge highway" from Livernois Avenue in Detroit to the area of the Edsel Ford Expressway in Dearborn, not as a local improvement but for the use of heavy truck traffic and as an improvement for the benefit of the West Side property owners, for the benefit of the motorists using west side thoroughfares, and for the

particular benefit of plaintiff's trucking competitors and their customers, and for the general benefit of the city as a whole.

* * * 13. That a detriment rather than a benefit inures to the plaintiffs in that the whole highway when completed is intended by the defendant and will become a competing right-of-way to the plaintiff, The New York Central Railroad Company's line of railroad and to the property of plaintiff, The Michigan Central Railroad Company, to be paid for by public funds and special assessments levied against the abutting property owners, including these plaintiffs; that this said assessment is invalid, unlawful and void for the following reasons:

A. That it violates amended Sections 1, 2, 3, and 4 of Chapter 3, Title 6 of the Charter of the City of Detroit in that it is not based upon benefits inuring to the plaintiff and/or its lessor and that it does not in any way benefit said property but is a benefit to this plaintiff's competitors and to the city at large;

* * *

C. That said assessment is invalid, unlawful, and void for the reason that it violates the 14th amendment to the Constitution of the United [redacted]

STATEMENT OF QUESTIONS INVOLVED

* * * 2. Even if the John Kronk project was a local improvement, did the special assessments here contested violate the Detroit Charter and Ordinances, and the Constitutions of both the State of Michigan, and of the United States of America, because they were arbitrary, unreasonable and discriminatory so as to constitute a fraud?

APPENDIX C

OPINION OF THE COURT

(Filed February 14, 1957)

(Consolidated Causes)

The plaintiff files its declaration in this case contending that the assessments made by the City of Detroit are invalid, unlawful and void because no benefits whatsoever were realized by plaintiff's right of way from the paving improvement.

The facts in brief are that the City levied this special assessment for the paving of Southern Avenue. Plaintiff has a right of way that runs parallel with this particular street, and for the reasons stated above brings this action.

It must be borne in mind that no charge of fraud, or illegality, or bad faith are made by the plaintiff against the defendant City of Detroit.

The court is of the opinion that the plaintiff was unable to show that no practical benefits whatsoever inured to its right of way now or in the foreseeable future. The court is of the opinion that the benefits do not have to accrue immediately, but could possibly accrue in the future. The defendant in the making of this assessment followed the law and the city charter provision, a hearing was granted to plaintiff, and a reduction was made in the assessment. The court believes that the assessments as they stand today are perfectly proper and within the authority of the defendant City of Detroit.

The case of *Gingerich & Sons v. Grand Rapids*, 256 Mich. 661-67 holds that it is not the present use of the property which determines the benefit it receives from a street improvement, and it is held in the case of *Louisville, etc. Railroad v. Paving Co.*, 197 U. S. 432 that the question of benefits or no benefits to land must be considered simply in its general relation and apart from its particular use.

The court is of the opinion that that which benefits the local community and especially develops and improves the locality brings benefit to the railroad as the principal business institution thereabouts. *Union Pacific Ry. Co. v. Board of Commissioners*, 114 Kan. 156, 217 Pac. 315, 318.

Of course, it must be borne in mind that the burden of proof rests with the plaintiff of proving its allegations upon which its claim is based, particularly where it is sought to have a tax declared invalid. *Rubatt v. Township of Wakefield*, 239 Mich. 537. *Kelsey v. Township of Burns*, 223 Mich. 174, 178.

The court might comment on the late brief filed by the plaintiff wherein it cites a case from the Supreme Court of Appeals of West Virginia in the case entitled *New York Central Railroad against the Town of Glasgow, et al.*, No. 10822. That case can be distinguished from the present case for the reason that the City of Detroit charter provides for notice by publication of the completion of the assessment roll, and not only did this afford an opportunity for the complaint, but plaintiff's appeal was given consideration and relief was granted by a reduction of one-third of the amount assessed. In the West Virginia case it holds that the right to relief in chancery was proper and was based on the fact that there are no provisions by statute or ordinance for review and correction of the special assessment. Accordingly, when the court of chancery there determined that judicial review was proper, it was

apparently to provide a relief not available at law or at administrative levels.

Therefore the court holds that the plaintiff is not entitled to relief in either case and a judgment should be entered in favor of the defendant in accordance with this opinion.

/s/ Thomas F. Maher,
Circuit Judge.

Dated at Detroit, Michigan,
Thursday, February 14th, 1957.

JUDGMENT

(Filed February 14, 1957)

(Cause No. 272,987 and Cause No. 284,352)

At a session of the Circuit Court for the County of Wayne, held at the Court House, in the City of Detroit, on the 14th day of February, 1957.

Present: The Honorable Thomas F. Maher, Circuit Judge.

The parties being again present, the Court heard the conclusion of testimony, the arguments of counsel and finds that the defendant did not undertake and promise as the plaintiff has complained against it.

Therefore, it is adjudged that the plaintiff take nothing by its suit and that the defendant recover its costs to be taxed and have execution therefor.

/s/ Thomas F. Maher,
Circuit Judge.

APPENDIX D

OPINION OF THE MICHIGAN SUPREME COURT

(Filed December 3, 1958)

Before the Entire Bench.

Kavanagh, J.

Two actions were instituted by the New York Central Railroad Company as lessee, assignee and subrogee of the Michigan Central Railroad Company and the Michigan Central Railroad Company against the city of Detroit to recover the amounts paid for assessments against railroad property for the paving of 2 portions of John Kronk avenue, formerly known as Southern avenue, in the city of Detroit.

The first segment paved extended from the westerly city limits of Detroit (bordering the city of Dearborn) easterly to Lonyo Road. The property of plaintiffs bordered John Kronk on the south side and was assessed for $19,606.20. Appellants paid this sum with interest, and sued to recover with interest. It was stipulated that plaintiffs' failure to institute suit on the first installment was barred by a 30-day statute of limitation, and that the refund covering his portion of the street would be limited to $15,289.60.

The second segment paved extended from Lonyo road east to Central avenue. Appellants' property on the south side of John Kronk was assessed for $14,952.12, and some property on the north side of John Kronk was assessed for $432.16, making a total assessment for this segment of $15,384.28.

Both segments were ordered paved by the common council of the city of Detroit pursuant to section 11, chapter 8, title 4, of the charter of the city of Detroit, as amended, which provides for forced paving of streets and alleys, rather than upon the petition of abutting property owners.

The second portion was paved in the year 1955 following the acquisition of land by condemnation for the opening and widening of John Kronk between Lonyo road and Central avenue.

Appellants brought these actions below pursuant to section 53 of the general property tax law (CL 1948, §211.53 [Stat. Ann. §7.97]) which provides a remedy for the recovery of a tax or special assessment paid under protest, within 30 days after such payment and protest, providing the tax or special assessment is shown to be illegal for the reason alleged in such protest.

It is important to a decision of this case that the language of the protests be set out in full. The reasons for protest with reference to the first assessment, mailed to the treasurer of the city of Detroit on May 22, 1953, were as follows:

> "This payment is made under protest because the so-called special assessment is illegal and void for the following reasons, among others:
>
> "1. That the cost of said paving has not been equitably assessed against the lots or parcels of real estate to be benefited by such paving as required by the provisions of amended Sections 2, 3 and 4 of Chapter III, Title VI, of the Charter of the City of Detroit, adopted April 4, 1949, in effect April 5, 1949.

"2. That the property of the Michigan Central Railroad Company abutting that portion of Southern Avenue which has been paved, as covered by said Assessment Roll, has by law been devoted permanently to the use to which it is now put, namely, as a site for an integral part of its common carrier railroad, devoted to the transportation, by railroad trains, of passengers and property in both intrastate and interstate commerce. That the fitness of its said property for such common carrier use is in no wise increased, nor is said property enhanced in value, by the said paving. That said paving was not laid to serve abutting property owners, but rather to take the heavy truck traffic off from other streets. It is to be used as a bridge for the movement of such heavy truck traffic destined between other points in the City and points located beyond and operated by motor carriers which compete with the Railroad Company. That no part of the cost of said paving should be assessed against the property of the said Railroad Company.

"3. That the proposed assessment against the property of the Michigan Central Railroad Company violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

"4. That, as is shown on the street paving plan for Southern Avenue, prepared in the City Engineer's office, and contained in said assessment roll, said Southern Avenue, between the City Line and W. P. L. of Lonyo, was in fact paved, not as an ordinary street or highway, to serve the abutting property owners, but as a through super-highway, to be used as a bridge, for the handling of heavy truck traffic, destined between other parts of the City and points located

beyond. Assessing your protestant for the sole benefit of its competitors constitutes a violation of the 14th Amendment of the Constitution of the United States with respect to due process and equal protection and the due process provision of the Constitution of the State of Michigan.

"Said New York Central Railroad Company reserves the right to contest the decision in any manner which may be available for such purposes.

"This payment is made under protest, involuntarily and under duress to save the Company and its properties from liens, distress, seizure and forfeiture, interest, and from such other fines and penalties as may be imposed and exacted."

The language of the second protest dated December 21, 1955, directed to the city treasurer, was as follows:

"The New York Central Railroad Company and its lessor, The Michigan Central Railroad Company, hereby protest payment of this so-called special assessment for the following reasons, among others:

"1. The paving of John Kronk Avenue is not required as a local or general improvement of the City of Detroit and is therefore beyond the power of said City to undertake under the provisions of its Charter and laws.

"2. The paving of John Kronk Avenue between Lonyo and Central, will not benefit the property of The Michigan Central Railroad Company abutting on the north and south of said highway, which property has by law been devoted permanently to the use to which it is now put, namely, as a site for an integral part of its common carrier railroad, devoted to the

transportation by rail of passengers and property in both intrastate and interstate commerce. The fitness of said property for such railroad use is in no way increased, nor is said property enhanced in value, by the paving of John Kronk Avenue. The said paving will not benefit the abutting property owners, but rather will benefit the City of Detroit and its west side residents exclusively, whose other streets will be thereby relieved of the annoyance and hazards of heavy industrial traffic. The said paving will in fact be a detriment to the Railroad Company in that, when completed, it will form part of a 'bridge highway' for the use and benefit of motor carrier competitors of said Railroad. The assessment therefore violates amended Sections 1, 2, 3, and 4 of Chapter III, Title 6 of the Charter of the City of Detroit.

"3. The assessment violates the due process clause of Section 16 of Article II of the Michigan State Constitution, and the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States.

"4. The assessment is excessive, unreasonable, arbitrary, fraudulent, inequitable, unfair and capricious, in violation of the Charter and laws of the City of Detroit and the Constitutions of the State of Michigan and of the United States, in that it requires the Railroad to subsidize its trucking competitors, to its detriment and without any gain or return to it or its property.

"Said New York Central Railroad for itself and as lessee of The Michigan Central Railroad Company, and The Michigan Central Railroad Company, reserve the right to contest the determination of the

Detroit Common Council in this matter in any manner which may be available for such purpose.

"Payment of said special assessment is made under protest, involuntarily and under duress, to save the said Railroad Companies and their properties from liens, distress, seizure and forfeiture, interest, and other fines and penalties as may be imposed and exacted."

The two actions were consolidated for trial, and a stipulation was entered into agreeing upon a number of facts with respect to the action, but providing for the introduction of evidence in addition thereto on the part of either party.

The lower court found that the plaintiffs were unable to show that no practical benefits whatsoever inured to their right-of-way now or in the foreseeable future; that the defendant in the making of this assessment followed the law and the city charter provision; that the assessment as they stand are perfectly proper and within the authority of the defendant city of Detroit. The lower court in its opinion found that that which benefits the local community and especially develops and improves the locality brings benefit to the railroad as the principal business institution thereabouts. The court further found as a matter of fact that the burden of proof rests with the plaintiffs of proving their allegations upon which their claim is based, particularly where it is sought to have a tax declared invalid. The court found that plaintiffs had failed to carry their burden of proof in this regard, and that, therefore, plaintiffs were not entitled to any relief in either case, and that a judgment in favor of defendant should be entered.

Plaintiffs appeal to this Court, claiming error on 13 points, all of which, we believe, are included in defendant appellee's following statement of questions involved:

> 1. "Was appellant's railroad right of way benefited by or susceptible of benefit from the paving of John Kronk Avenue so as to support assessments placed thereon by appellee?
>
> 2. "Were proceedings which resulted in these assessments against appellant's right of way in conformance with applicable statutory and Charter provisions?
>
> 3. "Did appellant sustain the burden of proof of illegality of these assessments for reasons specified in the respective written protests filed at the time of payment?"

It is the position of the plaintiffs that the railroad right-of-way has been operated as a switch yard for upwards of 100 years; that their right-of-way could not possibly benefit from the paving of John Kronk avenue; that the purpose of such paving was to establish a through route from the area of the Edsel Ford expressway in Dearborn to Livernois avenue in Detroit so as to be able to develop a heavy-duty trucking "bridge-highway" to implement the through movement of heavy-truck traffic from other points in the metropolitan area to and from the area involved, and for the benefit of trucking competitors of appellants, particularly those operating terminals in the vicinity of the area paved, and to generally relieve the traffic congestion of heavy cargo-carrying motor vehicles in this area.

Plaintiffs urge that since the improvement was created for this purpose and for the benefit of the entire metro-

politan area, the paving of John Kronk avenue was not a local improvement for which a special assessment could be levied under the charter of the city of Detroit, and particularly the provisions thereof which require assessment of the costs to properties which receive benefits from the paving. It is appellants' contention that their property does not benefit from the road, but that by reason of the additional traffic the paving is actually a detriment, in that it affords more competition by improving the road for their trucking competitors, and delays the operation of their trains and switch engines over the spur lines crossing John Kronk avenue. Appellants further allege that the assessment under these circumstances constitutes an arbitrary, inequitable, capricious, and unreasonable assessment on its property and thereby deprives appellants of their property without due process of law and without just compensation contrary to the State and Federal Constitutions, in that other properies of the same class as plaintiffs' property have not been assessed on a like basis with railroad property.

Defendant city of Detroit denies that plaintiffs' railroad property was not benefited by the paving of John Kronk avenue, and alleges that the amounts assessed were the result of a special assessment duly and legally placed against the railroad premises in accordance with the statutes of the State of Michigan and the provisions of the charter and ordinances of the city of Detroit.

The first question to be decided by this Court is whether or not lands of a railroad company used solely for a right-of-way are subject to special assessments for street improvements.

It is the contention of plaintiffs that the paving of John Kronk avenue did not especially benefit the property of plaintiffs.

The general property tax act of the State of Michigan (P. A. 1893, No. 206, as amended [C. L. 1948, §211.1, et seq.; Stat. Ann. §7.1, et seq.]), in section 7, subparagraph 8 thereof, as amended by P. A. 1952, No. 54 (C. L. S. 1952, §211.7 [Stat. Ann. 1953 Cum. Supp. §7.7]), exempts therefrom real property used in its operation, except that the same shall be subject to assessments for local improvements in cities and villages.

Section 4-d of the home rule act (C. L. 1948, §117.4d [Stat. Ann. §5.2077]) authorizes a home rule city to provide in its charter "for assessing and re-assessing the costs or any portion thereof, of any public improvement to a special district."

Section 2 of title 6, chapter 3, of the Detroit charter requires the common council to cause such portion of such street paving cost "as it may deem just to be equitably assessed against the lots or parcels of real estate to be benefited by such local improvement in proportion to the probable benefit to be derived therefrom."

In Detroit, etc., R. Co. v. Grand Rapids, 106 Mich. 13, it was held by a divided Court:

> "A section of the right of way of a railroad company, occupied by its tracks and used for no other purpose, cannot be assessed for the expense of improving a street which crosses it, under a city charter requiring such assessments to be made according to benefits received" (syllabus 2).

The arguments used by plaintiffs in the instant case are the same arguments used by the railroad company to establish the rule of law above quoted.

This Court in the case of Grand Rapids v. Railway System, 214 Mich. 1, in an opinion written by Justice Clark,

reviewed the law of Michigan with respect to railroad properties and quoted extensively from the case of Louisville, etc., R. Co. v. Paving Co., 197 U. S. 430 (25 Sup. Ct. 466), in which the question of benefits in so far as the present use of railroad property was discussed at length. The Court there said (p. 7):

> "'That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, * * * on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use.'"

Justice Clark, continuing, said (p. 11):

> "The weight of authority is, and we so hold, that the court may not say, as a matter of law, that the track, roadbed, or right of way of a railroad may not be benefited or susceptible of benefit by a local improvement."

We think the holding in Detroit, etc., R. Co. v. Grand Rapids, *supra*, must be overruled.

Under the authority of the above mentioned cases there can be no question about the right of the city of Detroit to assess the special assessment in the event benefit does actually accrue.

The present use under the authority of Grand Rapids v. Railway System, supra, and supported by the case of Powers v. City of Grand Rapids, 98 Mich. 393, does not answer the question. The use to which the owner may choose to put such land, or whether he may see fit to put it to any use, is not the test but, rather, the possible use that the land might have to the present owner or his successor in title.

In the case of Gingrich & Sons v. Grand Rapids, 256 Mich. 661, 667, 668, it is said:

> " 'It is not the present use of property which determines the benefit it receives from a street improvement; it is, rather, its available use. Benefits are not to be measured by present actual uses but by potential uses.' " (quoting from trial court's opinion.)

We cannot say that the improvement does not benefit plaintiffs' property.

There can be no dispute about the fact that land in the city of Detroit located at this particular spot could have uses from which an owner would derive benefit from having a paved avenue along its 2½ mile length. In addition to the special benefits, there is no question that by this paving benefits accrued to the city at large. This is recognized by the fact that the common council directed the assessment of 50% of the cost of the paving to the city at large, included in which was the additional cost for the unusually wide pavement on John Kronk avenue and the extraordinary thickness of the pavement so as to handle the heavy traffic to which it was to be subjected.

Under the charter of the city of Detroit it was the responsibility of the common council to determine the territory benefited by the improvement, to determine the lands to be included in the assessment district, and the portion of the benefits especially derived by those lands from such improvement. This duty they carried out in accordance with the terms of the charter, and plaintiffs were afforded an opportunity to object—successfully in one instance—to the assessment of benefits.

We find nothing in the record to justify the statement that the assessments were arbitrarily, unreasonably, and

capriciously made so as to constitute a fraud upon appellants which deprived them of their property without due process of law. On the other hand, the evidence discloses that consideration was given to the objections made through reduction of the amount to be paid by the abutting property owners and the amount to be paid by the city at large.

Since plaintiffs' land is properly in the district and receives *special benefits* from the paving, the question to what extent the value of their property was enhanced by the paving of the street is a question on which men may widely and honestly differ. It is a matter of judgment which the law and charter leaves to the common council and board of assessors and not to the courts. In the absence of fraud or bad faith or the following of a plan incapable of producing reasonable equality, their judgment must be held to be conclusive. Marks v. City of Detroit, 246 Mich. 517. It is not for the courts to say that this parcel of land is assessed too much or too little. The assessments were to be made according to benefits to each parcel of property, and there is nothing in the record showing that the common council did not assess the appellants' land in accordance with their best judgment.

The lower court found as a matter of fact that the record discloses no fraud, illegality or bad faith on the part of the defendant City of Detroit. In the absence of such a showing, this Court will not disturb the assessment. Brown v. Grand Rapids, 83 Mich. 101; Shimmons v. City of Saginaw, 104 Mich. 511; Nelson v. City of Saginaw, 106 Mich. 659; Power v. City of Detroit, 139 Mich. 30; Berston v. City of Flint, 176 Mich. 266; Graham v. City of Grand Rapids, 179 Mich. 378.

The burden of proof rests with plaintiffs of proving their allegations upon which their claim is based, particularly where it is sought to have a tax declared invalid.

Kelsey v. Township of Burns, 223 Mich. 173; Rubatt v. Township of Wakefield, 239 Mich. 536.

Plaintiffs in this case have not sustained the burden of showing that the special assessments were not levied in proportion to the benefits derived, or that the common council abused its discretion. The common council is presumed to have acted in good faith, and to have exercised correctly the discretion reposed in them. Powers v. City of Grand Rapids, 98 Mich. 393; Shimmons v. City of Saginaw, *supra;* Graham v. City of Saginaw, 317 Mich. 427.

Appellants rely to a great extent on out of state authorities on the question of special benefits to the railroad property. We do not believe it necessary to answer these cases in view of the decisions of the Michigan Court on this subject matter.

Appellants further rely upon Taxpayers' Association v. City of Detroit, 258 Mich. 390. This case is distinguishable from the present one. The Court therein said (p. 395):

> "The scheme of a wide cross-city thoroughfare has been partly carried out, but up to date stops short of the property of any plaintiff. The widening accomplished induces through traffic and creates a congested condition • • • only to be relieved by future extended widening, and the benefits then accruing will be assessed."

In the instant case the benefits accrue because of the possible use that could be made of the property at the present time.

The trial court heard the witnesses testify, observed their demeanor on the stand, and was in a far better posi-

tion to determine the weight that should be given the evidence that is this Court.

The trial court found as a matter of fact that the plaintiffs had not carried the burden of proof, and they were, therefore, not entitled to a judgment. This Court, after carefully reviewing the record, is not persuaded that his conclusion was contrary to the preponderance of the evidence.

The judgment of the court below is affirmed, with costs to defendant.

John R. Dethmers,
Leland W Carr,
George Edwards,
Concurred with Kavanagh, J.

DISSENTING OPINION OF KELLY, J.

Before the Entire Bench.

Kelly, J.

From its protest to the council, throughout the trial, plaintiff has claimed that:

> "The assessment is excessive, unreasonable, arbitrary, fraudulent, inequitable, unfair and capricious, in violation of the charter and laws of the city of Detroit and the Constitutions of the State of Michigan and of the United States, in that it requires the railroad to subsidize its trucking competitors, to its detriment and without any gain or return to it or its property."

Justice Black, agreeing with plaintiff, has stated:

> "Plaintiff has proved beyond assail, first, that neither the railroad nor its specially assessed property will in fact receive practical distinguished from fanciful benefit from the two segments of street improvements now scrutinized, and second, that such improvement was effectively designed, in part at least, to facilitate the business of plaintiff's chief carrier-competitors. * * * The railroad in these circumstances does not, and obviously cannot, make beneficial or other practical use of the improvement. And its property receives and will receive no 'probable' or 'potential' benefit therefrom. Defendant's suggestion to the contrary must, we think, be branded as resting 'wholly upon prophecy.'"

I agree with Justice Black's conclusion. His opinion considers plaintiff's rights under the Fourteenth Amendment. This opinion considers plaintiff's rights under the charter of the city of Detroit and under the Constitution and laws of this State.

Chapter 3, title 6, of the charter of Detroit, confines the council's right to impose special assessments to an amount the coun "may deem just to be equitably assessed against the lots or parcels of real estate to be benefited thereby in proportion to the probable benefits to be derived therefrom."

Plaintiff introduced proofs showing that it would not receive "probable benefits." The city did not introduce proof that plaintiff would receive "probable benefits," and confined its arguments to a possibility that (1) if plaintiff would some time in the future decide to construct offices or a mercantile type of building over the tracks then the paved highway would justify the assessment against plain-

tiff; (2) that there might develop in the future some type of carrier service known as a "piggy back" operation, which is the movement of loaded freight by truck trailer and rail flat car.

The opinions of the trial court and Justice Kavanagh do not state that plaintiff would receive "probable benefits." The trial court sustained the assessment because "that which benefits the local community and especially develops and improves the locality brings benefit to the railroad as the principal business institution thereabouts" and "the court is of the opinion that the benefits do not have to accrue immediately, but could possibly accrue in the future."

Justice Kavanagh's test as to propriety of the tax is as follows: "The possible use that the land might have to the present owner or his successor in title. • • • This particular spot would have uses from which an owner would derive benefit from having a paved avenue along its 2½ mile length. • • • We cannot say that the improvement does not benefit plaintiffs' property."

Plaintiff's main track, linking Detroit with Chicago, is only 21 feet from the Kronk highway and there is no access for plaintiff from its property to said highway, and plaintiff does not want, nor does it seek, such access. Besides maintaining the main track between Detroit and Chicago, the property being assessed consists of the largest railroad yard in Michigan—a nerve center for freight classification. Plaintiff has used the property for railroad purposes for over 100 years and has no intention to use it for any other purpose.

In a recent case (1956), New York Central Railroad Co. v. Town of Glasgow, 95 S. E. 2d 420, the supreme court of appeals of West Virginia considered a special assessment

for paving a street paralleling the railroad's right of way, and stated:

> "'To justify an assessment of the kind here in question, the benefits accruing to the land by the improvement must be direct, immediate, appreciable, and certain, and not contingent, remote, and uncertain.' Naugatuck R. Co. v. City of Waterbury, 78 Conn. 193, 61 A. 474, 475. • • •
>
> "The defendant contends that such benefits are to be determined with reference to the general uses to which the property is susceptible and with reference to its natural and unaltered physical condition rather than with reference to the use to which it is now devoted. • • •
>
> "The testimony is further to the effect that this land will not in all probability be abandoned by the plaintiff as a railroad or relocated within the next one hundred years and certainly not within the time the improvements to these streets are in existence. In such circumstances, are we to determine the value of this land for these improvements as it was originally, as farm land, for its possible use as a subdivision, or as presently used after the expenditure of much money for construction and maintenance for the purpose to which the owner has devoted it. The trial court, in its opinion quoted Sterling Nat. Bank & Trust Co. of New York v. Charleston Transit Co., supra (126 W. Va. 42, 46, 27 S. E. 2d 256), that 'Of course, determination of the question of benefits is not to be confined to the present use of the property involved'. This may be true, but at the same time the present use to which it is devoted cannot be excluded from consideration and some other possible but highly improbable use substituted in lieu thereof. • • • We

are of the opinion that the land must be considered as of the time of the levy and its present use, that being its most advantageous present use, and when so considered, in consideration of the evidence in this case, the assessment certainly is not based on any benefit."

The trial court erroneously stated: "It must be borne in mind that no charge of fraud, or illegality, or bad faith are made by plaintiff against the defendant city of Detroit." When this case was called for trial, appellant's attorney stated he would request leave to amend if there was any doubt that plaintiff was claiming constructive fraud, and was advised by the court, in the presence and without objection of appellee's attorney, that appellant's contention in this regard was understood by both the court and appellee.

We have established by decisions of this Court that charter provisions control and a special assessment may only be sustained upon the theory that the property receives special benefits, different from the benefits of the general public, and that said benefits should be actual or probable benefits. We have further stated that to be valid an assessment for benefits derived from the improvements of a public highway must be based upon actual or probable benefits and assessments are void if made upon an arbitrary basis, and that if such assessments are arbitrarily and capriciously made an unlawful levy results and it is immaterial that the honesty of the assessing officer is not impugned. See City of Lansing v. Jenison, 201 Mich. 491; Hatch v. Michigan Central Railroad Co., 238 Mich. 381; Dix-Ferndale Taxpayers' Ass'n v. City of Detroit, 258 Mich. 390.

The home rule act (C. L. 1948, §117.4d [Stat. Ann. §5.2077]) authorizes Detroit to provide in its charter the applicable assessment provision.

The city stresses, and my associates comment upon, Grand Rapids v. Grand Trunk Railway System, 214 Mich. 1. In this opinion the Court made its position clear that there must be a benefit to property to sustain a special assessment, by stating (p. 5):

> "It is a legislative policy of this State that railroad properties shall be subject to tax for local improvements. But if the track, roadbed, or right of way of of a railroad is not susceptible of benefit from a local improvement a taxing of such property for such improvement would be wanting in the due process of law required by the Constitution."

In concluding its opinion, the Court said (p. 11):

> "The weight of authority is, and we so hold, that the court may not say, as a matter of law that the track, roadbed, or right of way of a railroad may not be benefited or susceptible of benefit by a local improvement. No bad faith is charged and to what extent the property included in the assessment district was benefited and whether benefited or not were questions to be determined in the special proceedings. We cannot review the assessment."

This Grand Rapids case, *supra,* did not hold, directly or indirectly, that a city charter provision in regard to special assessment should not prevail nor that railroads could be discriminated against.

The question presented in this appeal is not whether a city can assess a railroad or whether a city, having the right to assess, may assess for a greater amount than it should, but, rather, was there proof of probable benefits justifying the assessment against plaintiff.

The test is not the trial judge's test that benefits could possible accrue," or that "a possible use that the land might have to the present owner or its successor in title." The test is clearly set forth in the charter, namely, proof of the presence or absence of probable benefits.

The special assessment of $35,575.43 against plaintiff did not meet the charter requirements and was "not in proportion to the probable benefits to be derived therefrom."

The judgment of the trial court is reversed and the cause remanded for entry of judgment in favor of plaintiff. Costs to appellant.

DISSENTING OPINION

Before the entire Bench

Black, J.

These suits were brought by plaintiffs[1] against the defendant city to recover the paid sum of special assessments made by the city against 4300 feet of plaintiff's right of way".[2] Such right of way, including the adjacent Detroit classification yard of the plaintiff railroad company, is a part of the NYC "main line" between Detroit and Chicago. The assessments were levied for "probable benefits" (quo-

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[1] Since New York Central and Michigan Central are legally united for present suit purposes, we shall in this opinion refer to them as "plaintiff" and "plaintiff railroad company".

[2] At the respective points of special assessment plaintiff's right of way includes the property on which its classification tracks are used and maintained. This property is said to be the largest railroad classification yard in Michigan. The first segment of special assessment, for the trackside paving of John Kronk avenue, extends 2600 feet easterly, from the west city limits of Detroit, to Lonyo Road. The second segment of corresponding assessment extends an additional 1700 feet easterly, from Lonyo to Central avenue.

tation from the charter of the defendant city, under which the levy was made). Allegedly these benefits have accrued and will accrue to plaintiff and its assessed property on account of the paving by defendant of that portion of John Kronk avenue (formerly Southern avenue), in Detroit, lying adjacent and parallel to such property.

The respective amounts sued for having been paid under statutory protest (in all they aggregate $35,575.43), and plaintiff having declared accordingly in the Wayne circuit, the 2 suits came to due issue and nonjury trial. Judgment applicable to both cases entered for defendant. Plaintiff appeals.

The vanguard question is whether the special assessment—for benefits that are said to accrue from a specific municipal improvement—of railroad trackage property by municipal authority, the assessment having been made and confirmed by the municipality according to requisite forms of law, is final (see dissent of Hooker, J., in Detroit, etc. R. Co. v. City of Grand Rapids, 106 Mich. 13, 16, 17, 18) and nonreviewable by the courts.[3] It is answered by our disposition of the presently considered Constitutional question.

Finding as we do that plaintiff has proved beyond assail, first, that neither the railroad nor its specially assessed property will in fact receive practical distinguished from fanciful benefit from the 2 segments of street improvement now scrutinized, and second, that such improvement was effectively designed, in part at least, to facilitate

[3] See Grand Rapids v. Railway System, 214 Mich. 1, in which the mentioned dissenting opinion of Justice Hooker was followed and the majority opinion (in 106 Mich. 13) was overruled.

the business of plaintiff's chief carrier-competitors,[4] plaintiffs' raised and saved federal question (whether these assessments are "invalid, unlawful and void for the reason that it [they] violate the 14th Amendment to the Constitution of the United States") comes to standing attention. Such question calls for examination of applicable decisions of the courts of the United States. The detail of facts will come later.

First: An excellent outline of principles, by which the asserted Constitutional question can and should be tested, was written in 1947 by the court of appeals of the tenth circuit. We refer to the following connected passage, taken from the opinion in Morton Salt Co. v. City of South Hutchinson, 159 F. 2d, 897[5] (p. 901 of report):

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[4] The motor truck was with us but a short time before the federal supreme court was called upon to consider, in a "benefit" assessment case, the adverse impact—on the busines of a railroad—of the improvement of a highway paralleling its tracks. (Road Improvement Dist. No. 1 v. Missouri P. R. Co., 274 U. S. 188). Holding, as did he courts below, that the highway improvement assessment against the railroad "was plainly arbitrary and unreasonably discriminatory", the supreme court in the cited case founded its decision on the following conclusions (p. 194 of report):

> "From all the testimony we think there is ample ground for believing that the improved road will lead to an increase in the traffic and revenue of the railroad, as respects freight moving in carload lots and passengers traveling considerable distances, but that the benefit from this will be cut down by a substantial loss in local freight and passenger traffic attracted to motor-driven vehicles moving over the improved road. That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are construed practically parallel to railroads is not only shown by the testimony but is common knowledge. It received distinct recognition in the President's message of December 8, 1922, to Congress."

[5] Two opinions of Morton were handed down by the 10th circuit court. The first, from which these quotations have been taken was given on appeal from denial of a temporary injunction. The second, reported in 177 F. 2d 889, was handed down following trial of the merits and appeal from judgment of the district court. It does not appear that certiorari to review either decision was applied for.

"But, however great the legislative power of taxation, it is not wholly without constitutional limitations. The due process and equal protection clauses of the Constitution do provide some measure of protection against the abusive exaction of a tax. The test of due process, say the courts, is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. In other words, the query is, what has the state given for which it may ask return. Wisconsin v. J. C. Penney Co., supra. If the tax imposed clearly results in such a flagrant and palpable inequality between the burden imposed and the benefit received that it amounts to an arbitrary taking of property without compensation, it is said to violate the due process guaranty under the Fourteenth Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations, i. e., see Dane v. Jackson, supra; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 614, 19 S. Ct. 553, 43 L. Ed. 823; Houck v. Little River Dist., supra; Cooley, Sec. 144."

Proceeding farther, and on page 902 of report of Morton, due emphasis was placed on Mr. Justice Cooley's oft-quoted "constitutional test".[4] The court said:

"Whether the exaction is in the form of a special assessment for a special improvement, or a general tax for the general welfare, the constitutional test is always whether any thing is given or offered for that which is taken. Indeed, the underlying purpose for the creation of special taxing districts is to attain a

[4] See employment thereof in Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444, in these words: "The simple but controlling question is whether the state has given anything for which it can ask return."

constitutional balance in relationship to benefits conferred for burdens imposed. Cooley Taxation, Vol. 1, Sec. 320."

From these general principles we move to consideration of defendant's contention that Louisville etc., R. Co. v. Barber Asphalt Paving Co., 197 U. S. 432 (followed in Grand Rapids v. Railway System, supra), requires denial of plaintiff's appeal to the Fourteenth Amendment. Admittedly, on its apparent face, Louisville tends to support conclusion that special assessments of present nature do "not go beyond the bounds set by the Fourteenth Amendment of the Constitution of the United States." Louisville, however, was later restricted in scope by the same court and the same writer (Mr. Justice Holmes). As was noted in the ensuing case of Martin v. Dist. of Columbia (cited and quoted below), "Constitutional rights like others are matters of degree". By force of such "degree" standard, Louisville must be read in the light of later decisions of the Supreme Court.

In Martin v. District of Columbia, 205 U. S. 135, the court was called upon to consider another like case, that of validity of special assessments to defray the cost of widening an alley in Washington. The alley extended through a "square", corresponding with what is commonly known as a city block. Having referred to the act of Congress under which the assessments were authorized, and having determined to quash the assessments in question, the court said (per Holmes, J.):

> "The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not

have passed. The present is said to be a flagrant instance of that sort. If this be true perhaps the objection to the act would not be disposed of by the decision in Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.

"But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain."

In Wagner v. Baltimore, 239 U. S. 208 the general rule of Louisville and like cases came to consideration and application, followed by this language (p. 219, 220 of report):

"We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land owners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise."

In Gast Realty and Investment Co., v. Schneider Granite Co., 240 U. S. 56, Mr. Justice Holmes, speaking again for the court, said this (pp. 58, 59 of report):

"The legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. Houck v. Little River Drainage District, 239 U. S. 254, 262. The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness or go beyond the reasonable probabilities. French v. Barber Asphalt Co., 181 U. S. 324. Cass Farm Co. v. Detroit, 181 U. S. 396, 397. So in the case of a square bounded by principal streets the land might be assessed half way back from the improvement to the next street. Louis. & Nash. R. R. v. Barber Asphalt Paving Co., 197 U. S. 430. But as is implied by Houck v. Little River Drainage District if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties

will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact. Martin v. District of Columbia, 205 U. S. 135, 139."

In Branson v. Bush, 251 U. S. 182, 189, 190, appears this reference to the earlier cases mentioned above:

"The subject was carefully reexamined and the law restated in cases so recent as Wagner v. Baltimore, 239 U. S. 207, and Houck v. Little River Drainage District, 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is 'arbitrary and wholly unwarranted,' 'a flagrant abuse,' and by reason of its arbitrary character is mere confiscation of particular property.' And see Withnell v. Ruecking Construction Co., 249 U. S. 63, 69; Hancock v. Muskogee, 250 U. S. 454, 457; Embree v. Kansas City Road District, 240 U. S. 242, 250."

In Kansas City Southern R. Co. v. Road Improvement Dist. No. 6, 256 U. S. 658, Gast, Houck, Louisville and Branson were reviewed and the following declarations were made (p. 661 of report):

"Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in

a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900.00 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. Royster Guano Co. v. Virginia, 253 U. S. 412, 415. It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

In Thomas v. Kansas City So. Ry., 261 U. S. 481, the issue being validity of assessments for drain benefits against the appellee railroad companies (they were assessed to the tune of 57% of the burden), rules of the Houck, Branson and Kansas City Southern cases were considered and these conclusions reached (p. 485 of report):

"The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. The market value of the 12,000 acres may increase largely before any additional land is cultivated, or even before the improvement is made. The railroad can derive

the indirect benefit, through increased traffic, only after the drainage of the wild lands has been effected and the reclaimed lands are being cultivated. The work of reclamation had not even begun. Obviously there could not be any increase in traffic receipts during the year 1918, in which the tax is laid. Appellants argue that the assessed valuation of the lands would probably be greatly raised in later years; that the assessment upon the railroad property would probably not be raised; that the proportion or the annual burden imposed upon the railroad would diminish from year to year; and that, in course of time, the aggregate of the taxes levied upon each piece of property would be thus adjusted so as to correspond to the benefits received. This argument is relied upon to save the scheme of apportionment. But it rests wholly upon prophecy. The fact is that the tax levied is grossly discriminatory. The best that can be said of the scheme of taxation (so far as it concerns the railroad) is that the burdens imposed will grow less, as its ability to bear them grows greater."

Finally, and in Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, we find that the supreme court was asked to examine, under the Fourteenth Amendment, a Tennessee statute requiring that half the total cost of each rail-highway grade separation—as ordered by a state commission—be paid by the railroad. The court, speaking through Mr. Justice Brandeis, announced the principal question this way (p. 428):

"The main contention is that to impose upon the Railway, under these circumstances, one-half of the cost is action so arbitrary and unreasonable as to deprive it of property without due process of law in violation of the Fourteenth Amendment.";

and then added these words of present significance (pp. 426, 429, 430):

> "The new highway, paralleling lines of the Railway and intended for rapid moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the Railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the Railway. Buses will operate over the new highway in regular scheduled movements in the same way as passenger trains. Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carrier and by private concerns, will compete for the most profitable classes of freight. The competition besides reducing the volume of traffic will compel reduction of rates. . . .
>
> "While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; (citing cases); so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. (Citing cases including Gast and Kansas City So. v. Rd. Imp. Dist.)"

Following its report, Nashville was the subject of searching thought as shown by 3 law review articles from which we quote:

> "Mr. Justice Brandeis' opinion marshalls the special facts relating to 'changed economic and transportation conditions' in an impressive review, in which he draws generously on extra-legal material, such as

the Reports of the Chief of Federal Bureau of Public Roads, other federal and administrative reports, insurance bulletins on accident statistics and presidential messages. The opinion indicates that those facts involve a major question relevant to the constitutionality of the statute; the question of the railway's responsibility for, or interest in, the elimination of the danger and the improvement of traffic conditions necessitating the underpass. The decision compelling a consideration of the facts emphasizes also the legal significance attached by the majority in this case to the 'changed economic and transportation conditions' of the present day." (23 California Law Review, 633.)

"While the Court held that competition between motor vehicles and the railroads had reached proportions significant enough to merit consideration in determining whether a particular assessment on a railroad is constitutional, it found it difficult to reconcile the result arrived at with well settled principles. For in previous cases in this field, which hold without dissent that a state may require a railroad to contribute up to the full cost where an underpass is found necessary for the public safety and where the cost of its construction is reasonable, the factor of motor competition and the other arguments raised by the railroad in the instant case were expressly and consistently held to have no bearing on the constitutional issue. While the holding of the Court is reached by excepting this case from prior decisions on the basis of its special facts, its effect is to widen the scope of inquiry into the reasonableness of grade crossing elimination orders by including all the factors relevant to the determination of that broad iss (44 Yale Law Review, pp. 1261, 1262.)

"That the law of railroads—and perhaps of other common carriers—is entering upon a period of metamorphosis does not seem to be an extravagant prediction. Rather does it appear to be an almost inevitable conclusion. An unmistakable warning of that change is implicit throughout the opinion of the Supreme Court of the United States in the case of Nashville, C. & St. L. Ry. v. Walters. It is not the actual decision in the case which prompts the above prediction; it is the discussion of Mr. Justice Brandeis." (13 North Carolina Law Review, 49[illegible])

Atchison, Topeka and S. F. R. Co. v. Public Util. Comm., 346 U. S. 346, is not opposed to applicability here of foregoing standards. In that case Nashville was carefully distinguished below this significant preface (p. 352 of report):

"These [in Atchison] were not improvements whose purpose and end result is to enhance the value of the property involved by reason of the added facilities, such as street, sewer or drainage projects, where the costs assessed must bear some relationship to the benefits received" (citing Gast and Kansas City, So., supra).

The ground rules are before us. Next come the facts.

Second: It is testimonially established that the pavement of John Kronk, for the construction of which plaintiff's right of way has been specially assessed for benefits, was poured of extra thickness of concrete to withstand continuous use by heavy trucks, and, for the same reason, that the pavement was constructed of 44 foot width rather than the customary 30 foot paved width of a street. Necessarily, such construction contributed materially to increased costs of the project.

It is similarly established that more than a mile of the area opposite plaintiff's specially assessed right of way, which area extends along the north side of John Kronk from the west city limits (of Detroit) to Martin Avenue, is zoned by defendant as "heavy industrial." Such area is principally devoted to industrial operations and use (for truck "terminals") by a substantial number of national and local carriers of freight by motor truck. That the 2 paving projects were designed to provide needed relief, for nearby streets of Detroit, from heavy commercial traffic—likewise to provide a direct motor connection between the area and the presently described expressway—was attested in a letter written by the clerk of the common council of Detroit, in 1953, to plaintiff's general counsel, having to do with the assessments in question. Consistent as it was with other record facts, some stipulated, some disputed, and some overwhelmingly established, the letter is significant. The concluding paragraph reads as follows:

> "After receiving your appeal, an attempt was made to induce Wayne County to assume a portion of the expense of this project because, as planned, Southern Avenue will become a through highway connecting with the Expressway System and should relieve certain state, county and city thoroughfares of considerable commercial traffic. The county has declined to assume any portion of the expense of this project, and therefore the common council must deny your appeal."

The steady passage of high speed trains along the main line, adjacent as it is to the south side of John Kronk, and the exclusive utilization by the railroad of the nearby classification yard for handling of freight by rail, join in negation of utility of John Kronk in connection with the

business of the railroad. No passenger depot is situated in the vicinity of the assessment. The NYC freight station is nearly 4 miles away. There are no exit or entrance driveways to John Kronk from the right of way, likewise the yard, between the city limits and Lonyo and between Lonyo and Central Avenue.[7] The railroad in these circumstances does not, and obviously cannot, make beneficial or other practical use of the improvement. And its property receives and will receive no "probable" or "potential" benefit therefrom. Defendant's suggestion to the contrary must, we think, be branded as resting "wholly upon prophecy" (See quotation from Thomas, supra). As was said of the same contention in Northern Pac. R. Co. v. City of Grand Forks, — N. D. —; 73 N. W. 2d 348:

> "We think this argument is of little weight when applied to property which has been committed to a definite use by a substantial investment. Before the use of such property can be changed the investment therein may have to be sacrificed and a new investment made. Certainly that is true in the case of the lots under consideration. These lots have been occupied by railroad tracks for sixty years. It is highly speculative to assume that the railway company will now tear them up and build business buildings on the land. See Rood v. City of Ames, 244 Iowa 1138, 60 N. W. 2d 227. To adopt the theory contended for would be to say that in order to prevent a future

[7] It was stipulated in the court below:

"The City proposes to extend the highway from Lonyo east to Livernois, and since the institution of this suit the City of Dearborn has extended Southern Avenue from the city limits to Wyoming. The Railroad has no private roadways or driveways leading from Southern Avenue to any portion of its yard or other facilities."

wholly speculative injustice, we must approve one which is both immediate and certain."

Against this factual background the defendant city, over timely and due protest of the plaintiff railroad, has proceeded to specially assess plaintiff's described right of way (first project) in the total sum of $19,606.20. This is more than 50% of the total amount specially assessed in the special assessment district. Likewise, referring now to the second project, the defendant city over similar protest has proceeded to specially assess plaintiff's right of way in the total sum of $15,384.28. Here again the total amount assessed is more than half the total amount specially assessed for the project. All this, we conclude, suggests firm ruling that the city has given nothing of special benefit to the railroad for that which it proposes to take. There is more to be said, however.

The western city limits of Detroit at this point are the east city limits of Dearborn. Next, going west, come a succession of steadily burgeoning villages and cities bidding fair, ere long, to make of Wayne and Washtenaw counties a continuous series of municipalities lying athwart plaintiff's 100 year-old Detroit-Chicago right of way. Proceeding westward along that right of way, with lesser yet similar augury, we find the row of developing municipalities that are located in Jackson, Calhoun and Kalamazoo counties. And paralleling the right of way, never far distant therefrom, is the planned and partially completed "Detroit-Chicago industrial expressway."

Should we affirm the judgment of the circuit court, will not Detroit and Dearborn stand free to correspondingly assess plaintiff's said right of way for more "benefits" arising from the planned improvement (of extended and opened John Kronk)? Such improvement already is due

to extend east and west an additional one and one-half to two miles. Will not each of the other cities and villages, on and on toward the setting sun, be enabled at will to "beneficially" assess plaintiff's right of way to meet half or more the cost of paving present and future trackside streets or highways? At this specially levied cost-rate of at least $50,000 per rail mile, even the greatest railroad of the United States might, in event of such affirmance, be forced out of the rail carrier business in Michigan. The portents of the judgment below thus become sobering if not alarming, assuming in each future instance that the facts shown absence of benefit remain constant.

This Court, equally with the courts of the United States, is obliged to guard and enforce rights secured by the national Constitution whenever those rights are properly asserted in any suit or proceeding before it (United States v. Bank of New York & Trust Co., 296 U. S. 463, 479). Here the plaintiff railroad company has fully asserted, and has overwhelmingly supported, a right guaranteed by the Fourteenth Amendment—that of immunity from discriminatory local taxation. We must, in the order of things, uphold that right regardless of offense if any to our own decisions.

The defendant city places, we think, undue reliance on Louisville and its utilization by this Court in Detroit, etc. R. Co. v. Grand Rapids, supra. In Louisville a "lot" only of the railroad wa sspecially assessed. The assessment was comparably small in amount. Some evidence of indirect benefit to the lot, by virtue of the improvement, appeared to the satisfaction of a court which, in the year 1905, was considering the question of benefits accruing to the property of a railroad when competing motor trucks were not utilizing trackside paved improvements and were in fact unknown. The legislative judgment thus withstood

the Constitutional attack. Here more than three quarters of a mile of property, exclusively devoted to rail traffic, has been assessed for benefits when there is no benefit. Here punitive and arbitrary assessments amounting to more than $35000 are involved, with more of the apparent same to come. We conclude in these circumstances that the rules last quoted above (from Nashville) are decisive and that Louisville is not.

On foregoing premises we hold that the assessments in question arbitrarily discriminate against the plaintiff railroad in violation of rights secured to it by the Fourteenth Amendment. The judgment of the circuit court in these circumstances should be reversed with remand for entry of judgment, applicable to both causes, in favor of plaintiff. Plaintiff should recover costs.

Talbot Smith,
John D. Voelker,
Concurred with Black, J.

SUPREME COURT ORDER AFFIRMING JUDGMENT OF CIRCUIT COURT

(Filed January 3, 1959)

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the third day of December in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and having been argued by counsel, and due deliberation had thereon, and the Court being equally divided upon the question of reversing the judgment of the Circuit Court for the County of Wayne, therefore, in accordance with the statute in such case made and provided, it is ordered that the judgment of the Circuit Court for the County of Wayne stand affirmed. It is further provided that no costs be awarded herein.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 15th day of December in the year of our Lord one thousand nine hundred and fifty-eight.

Donald F. Winters,
Clerk.

(Seal)

APPENDIX E

SUPREME COURT ORDER DENYING REHEARING

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twelfth day of January in the year of our Lord one thousand nine hundred and fifty-nine.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

A motion for rehearing having been heretofore submitted herein, it is hereby denied with costs to defendant.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 16th day of January in the year of our Lord one thousand nine hundred and fifty-nine.

Donald F. Winters,
Clerk.

(Seal)